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CHARLES ELMORE C

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 292

PETER DURYEE,
Trustee of the Property of The New Jersey and New York Railroad Company,
Petitioner,

vs.

ERIE RAILROAD COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.

STATEMENT OF CASE.

For a clear understanding of the issues decided by the courts below, it is important to emphasize that the present suit was initiated by the complainant below more than five years after the Erie Railroad Company was successfully reorganized under Section 77 of the Bankruptcy Act, and prays for a money judgment against the reorganized company in the amount of $1,434,428.01 based upon claims which were in existence and should have been proved in the Erie Railroad Company Reorganization Proceedings.

Petitioner's statement of the case is therefore supplemented for the purpose of more fully describing—

(a) The Erie Reorganization Proceedings; and

(b) The nature of complainant's cause of action.

ERIE REORGANIZATION PROCEEDINGS.

On January 18, 1938, Erie Railroad Company, finding itself unable to meet its obligations as they matured, filed a petition for reorganization under Section 77 of the Bankruptcy Act, and, upon approval of the form of such petition, came under the jurisdiction of the United States District Court for the Northern District of Ohio, Eastern Division, in Bankruptcy (fol. 46).* It remained under the jurisdiction of the Bankruptcy Court for almost four years.

Several plans of reorganization were promulgated or proposed by different classes of the Erie's creditors or stockholders, were submitted to the Interstate Commerce Commission, in accordance with the provisions of Section 77 of the Bankruptcy Act, and eventually, as a result of such hearings, a plan for reorganizing the company and effecting thereby a scaling down of the rights of various claimants evolved. Pursuant to the provisions of the reorganization statutes all creditors or claimants affected by the plan were given an opportunity to indicate by vote their approval or disapproval of the same, and following a favorable vote said plan was finally approved and confirmed.

Thereafter, to wit, on December 20, 1941, the Bankruptcy Court entered Order No. 386 in said Reorganization Proceedings (75-133) hereinafter sometimes referred to as the "Bar Order." Said Order No. 386 was entered pursuant to subdivision (f) of Section 77, which provides as follows:

> "Upon confirmation by the Judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon

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* References noted as such are to transcript of record. Reference (fol. ....) are to transcript of record by folio number. References to pages of the Erie Reorganization Record are referred to as (E ....).

the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it.

"Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the Judge relative thereto, under and subject to the supervision and the control of the Judge, the laws of any state, or the decision or order of any state authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor, or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, *shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer continuance or retention,* * * *" (Emphasis supplied.)

In accordance with the foregoing, Order 386 provided, in part, as follows:

"(3) At 12:01 A. M. Eastern Standard Time on December 22, 1941 (hereinafter referred to as the 'Closing Time'), all of the business assets, franchises and property, of every kind and character, real, personal and mixed, constituting the estate of Erie Railroad Company, Debtor, and all right, title and interest of the Trustees of the property of Erie Railroad Company therein, shall vest in and become the absolute property of Erie Railroad Company, free and clear of all rights, claims, liens, incumbrances and interests of the Trustees of the property of Erie Railroad Company * * *, of the holders of the First Preferred, Second Preferred and par value Common Stock

of Erie Railroad Company, and of the creditors of Erie Railroad Company, * * * except as hereinafter provided, and Erie Railroad Company * * * shall thereupon, as of said time and date, automatically be forever released and discharged from all of their respective debts, obligations and liabilities except as hereinafter provided." (97)

Section (55) of said Order No. 386 further provides as follows:

"From and after the Closing Time all persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, are hereby restrained and enjoined from interfering with, or taking steps to interfere with Erie Railroad Company, its officers and Agents, or the operation of the lines of railroad or properties or conduct of the business of Erie Railroad Company, by reason of or on account of any claim against or interest in Erie Railroad Company which shall have been discharged under the Plan of Reorganization and this Order, and all such persons, firms and corporations are hereby restrained and enjoined from otherwise interfering with the carrying out of the Plan of Reorganization." (132)

NATURE OF COMPLAINANT'S CAUSE OF ACTION.

Complainant below is the Trustee of the Property of The New Jersey and New York Railroad Company in reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of New Jersey. The subject matter of his complaint consists of 24 separate obligations and debts of the New Jersey described in Paragraph Fourteenth of his Complaint (7) aggregating $1,434,428.01, and incurred by the New Jersey *during the period up to and including June 30 1938* (7),— that is for a period prior to the reorganization of Erie Railroad Company under Section 77 of the Bankruptcy Act.

The relief prayed for by complainant is:

(1) "that the Court find and order that all of the obligations and debts of The New Jersey and New York Railroad Company, as specifically set forth in Paragraph Fourteenth of this complaint, together with accrued and penalty interest are obligations and debts of defendant (reorganized Erie Railroad Company), and are presently due and payable";

(2) "for a judgment against defendant in an amount sufficient to satisfy such obligations and debts, plus accrued and penalty interest thereon"; and

(3) "for such other and further relief as to the Court may seem just and equitable."

As a basis for recovery the complaint contains allegations setting forth the ownership by the respondent of between 80 and 85% of the outstanding common stock of The New Jersey and New York Railroad Company prior to June 30, 1938, and the exercise by respondent as the parent corporation of control with respect to such matters as the election of directors, designation of officers or key employees, the creation and existence of contract relationships between the parent and subsidiary with respect to operations and collective bargaining contracts, location of the principal office of the subsidiary, the custody of subsidiary's documents by the parent, the direct or indirect payment of interest on the bonds of the subsidiary by the parent and the fact that the parent represented that the subsidiary was part of what was commonly known as the "Erie Railroad System."

On the basis of such allegations of an ordinary parent-subsidiary relationship, complainant then urges that the corporate identity of the subsidiary should be disregarded and that all debts and obligations of the subsidiary should be considered to be the debts and obligations of reorganized Erie Railroad on the authority of the decision in *Consolidated Rock Products v. DuBois*, 312 U. S. 510 (fol. 33).

It is significant to note that the complaint does not attempt to state a cause of action for the setting aside of the bar order discharging reorganized Erie of all debts or liabilities incurred or arising prior to the Reorganization Proceedings. The complaint contains no reference of any kind to the Bar Order or to the fact that Erie has been reorganized since the accrual of the debts and obligations asserted. There are no allegations of fraud or breach of fiduciary duty directed toward the effectiveness of such bar order or of such reorganization proceedings. The fact that Erie had been reorganized under Section 77 of the Bankruptcy Act more than five years prior to filing of the complaint is not even mentioned.

Although principal reliance is placed upon the so-called doctrine of the *Consolidated Rock Products* case, *supra*, which involved only the question as to the fairness and equity of a reorganization plan involving a parent and subsidiary in the reorganization court, the present action was not initiated in the reorganization proceedings of Erie Railroad Company but was brought as a separate action for money judgment against the reorganized Erie.

In this connection it is pertinent to note that while complainant, before filing the present action, secured broad authority from the New Jersey District Court to take, commence, institute or join in actions or proceedings against Erie Railroad Company, as set forth in Exhibit A to his complaint (11), for some reason unknown to the respondent, he chose to disregard the holding of his New Jersey court and brought a plenary action for a money judgment against reorganized Erie instead of a proceeding in the Reorganization Proceedings to vacate, alter or modify such Reorganization Plan.

The holding of the New Jersey court just referred to resulted from the following circumstances: In 1945 certain creditors of the New Jersey sought in the New Jersey proceedings an order directing the Erie Railroad Company or its officers, directors or trustees, to make payment to

all creditors of the New Jersey (R. 183). Hearing was had before Augustus C. Studer, Jr., Special Master appointed by the New Jersey court, and the Master rejected such claims of creditors on the basis that the provisions of subdivisions (a) and (f) of Section 77 and the provisions of Order No. 386 of the Ohio court were controlling. The Special Master pointed out:

> "It is not intended hereby to say that such reorganization court may not, upon equitable grounds, vacate, alter, or modify such Reorganization Plan but *it is intended to hold that any application to vacate, alter or modify the plan of reorganization, or the decrees entered in connection therewith by the reorganization court, must be made to that court, acting under its equitable powers as a court of bankruptcy.* Specifically it is not intended hereby to pass upon the validity of the claim asserted by the petitioner, Burley.
>
> "It should be noted that the cases cited by the petitioner, Burley, which deal with the violation of the parent-subsidiary relation as giving rise to a claim against the parent, were cases on appeal from a judgment or a decree of the reorganization court approving or disapproving a plan of reorganization and, further, that all cases dealing with subsequent modifications of a plan after a bar order or final decree were either in the reorganization court or on appeal from a judgment or decree of the reorganization court." (189) (Emphasis added.)

By Order dated April 10, 1946 the Report of said Special Master was confirmed as filed (R. 223).

It is therefore a fair appraisal of the complaint below that it disregards the holding of the New Jersey court and in violation of that holding, constitutes a collateral attack upon the Reorganization Proceedings, and particularly Bar Order No. 386 and is not an application to the reorganization court acting under its equitable powers as a court of bankruptcy to vacate, alter or modify such Reorganization Plan.

RESPONDENT'S ANSWER.

Because of the omission from the complaint of any reference to the orders of the Reorganization Court discharging the reorganized company from all claims and debts (including those represented by complainant below) which were brought within the scope of the proceeding, respondent in its answer and as an affirmative defense pleaded the facts with respect to such proceedings and alleged that "plaintiff's alleged cause of action against Erie Railroad Company accrued many years prior to January 18, 1938 (the date of the filing of the petition of Erie Railroad Company for reorganization under Section 77) and plaintiff's suit is barred by Order No. 386."

Thereafter, respondent Erie filed a motion for summary judgment, and following argument to Judge Wilkin such summary judgment was granted. It is interesting to note that in the District Court the instant case happened to be assigned to Judge Wilkin who had been the Federal District Judge in charge of the Reorganization Proceedings of Erie Railroad Company and who, at the request of the parties, took judicial notice of the entire Erie Reorganization Proceedings in connection with his disposition of the motion for summary judgment in the instant civil case.

II. ARGUMENT.

I. The first two reasons urged by the petitioner for the granting of a writ of certiorari involved a consideration as to the propriety of a summary judgment in the instant case. It is urged that the Court should clarify the proper scope of Rule 56 for the guidance of the Federal Courts.

It will be noted that Rule 56(b) provides that—

> "A party against whom a claim, counterclaim or cross claim is asserted or a declaratory judgment is sought, may *at any time,* move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." (Emphasis ours.)

It is therefore apparent that a summary judgment is appropriate if (1) "the complaint does not state a cause of action" or (2) if as specifically provided in Rule 56(c) "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact *and that the moving party is entitled to a judgment as a matter of law.*"

It follows therefore that the formal denials and issues created by the filing of an answer do not, *ipso facto,* create genuine issues as to material facts, precluding a summary judgment.

Both courts below found that respondent was entitled to summary judgment *as a matter of law.* In each case they refused to permit the assertion of preexisting and provable debts or claims against a reorganized company, more than five years after such reorganization.

On page 16 of his brief petitioner maintains that if he can prove fraudulent conspiracy between Erie's officers, Trustees and creditors to put through the bar order to defraud New Jersey creditors the bar order should be set aside. This is the first time that petitioner has recognized that the bar order must be set aside before he can get any

relief. But in his petition he asks for money judgment against Reorganized Erie and is collaterally attacking the bar order. But let us disregard the fact that he is knocking at the wrong door and answer the question of whether the bar order can be set aside. In this connection the Court of Appeals said (R. 343):

> "In this case, there appear no claims or allegations of active fraud, constructive fraud, spoliation, waste or unfair management to the advantage of Erie and disadvantage of New Jersey, which would justify setting aside the bar order to permit the assertion of appellant's claims, *even were that possible.*" (Emphasis ours.)

While the Circuit Court of Appeals did not deal directly with this question of collateral attack it did clearly intimate its doubt whether in the present action the Court could set aside the bar order.

The District Judge in his opinion disregarded the question of collateral attack, saying,

> "It would be unjust and unfair to those who have accepted and acted upon a reorganization plan if the Court were thereafter to reopen the plan and change the conditions which were the basis of its earlier acceptance."

However, it is clear that a creditor, after the consummation of a reorganization in bankruptcy, no longer has any claim which will give him a standing to attack the confirmation of the plan in an independent proceeding. *Finletter* in *The Law of Bankruptcy Reorganization* at page 656 ff says:

> "The confirmation of the plan or arrangement. In the line of cases of which *Northern Pacific v. Boyd* is the leading example, creditors have been allowed, in an action independent of the equity receivership, to recover the full amount of their claims against the new company to which the properties were transferred under the reorganization plan. Such a suit by a creditor

is similar to a collateral attack on the equity proceeding. It does not assert that there was a failure of jurisdiction over the person or the subject matter, but it does attack the effect of the foreclosure sale. It alleges, successfully, that the sale is ineffective to bar the claims of unsecured creditors when it is but a step in the carrying out of a plan in which the stockholders of the old company participate and the old creditors do not. The theory upon which this result is based is not entirely clear. It is believed that the principle that equity will not lend its aid to create an inequitable result is the basis for the rule, but the reason has also been given that such a sale is a transfer in fraud of creditors. It makes no difference for the present purpose which theory is used. The result is that under certain circumstances the finality of the foreclosure sale may be attacked by a party in interest in an independent proceeding.

"The complicated rules which have been developed from the *Boyd* case and its successors have been called, in the discussion of the subject in Chapter VI, the equity standard of fairness as to plans and arrangements. This equity standard has been incorporated into the reorganization chapters of the Act as one of the criteria which a plan or arrangement must meet. The question then arises whether the right of a creditor or stockholder to make the kind of independent attack on the proceeding which is exemplified by the *Boyd* case has also been carried over into bankruptcy reorganization proceedings. May a creditor or stockholder of a debtor which has been reorganized in bankruptcy bring an independent action against the new company or the reorganized debtor if the plan or arrangement violates the equity standard of fairness? May what is analogous to a collateral attack on the confirmation of the plan or arrangement be made?

"The carrying out of a reorganization through an equity receivership differs in two important respects from the method whereby the corresponding result is reached under the Bankruptcy Act. In the first place the sales on the foreclosure and creditor's bills in equity have no effect on the claims of the creditors.

They merely provide a method whereby the property may be converted into cash which will be applied in partial satisfaction of the debts. Even those creditors who do not file their claims within the time fixed by the court preserve their claims intact. The bar order merely prevents them from sharing in the proceeds of the sale. A creditor such as Boyd therefore retained his status as a claimant and possessed a legal standing to assert that the transfer of the properties was fraudulent in law as to him. A reorganization proceeding in bankruptcy is different. It operates *in rem* as to all persons except those who claim the ownership of property affected by the plan or arrangement. It discharges the debts of creditors and, under Chapter X and Section 77, the interests of stockholders. As to these latter parties it quiets title in that it divests the property of the debtor of all claims of creditors and (under Chapter X and Section 77) stockholders for which provision is not made. *This difference between the two proceedings lends itself to the conclusion that a creditor, after the consummation of a reorganization in bankruptcy, no longer has any claim which will give him a standing to attack the confirmation of the plan or arrangement in an independent proceeding.*" (Emphasis ours.)

As pointed out in *Collier on Bankruptcy*, 14th Ed. at page 3923:

"The very kernel of a reorganization proceeding is the careful consideration given to all outstanding liabilities, debts and claims. Under the terms of the chapter, every claim and interest of every kind, secured or unsecured, fixed or contingent, liquidated or unliquidated, is brought within the scope of the proceeding. Such a sweeping inclusion is necessary so that it may be possible to determine whether a plan is fair, equitable and feasible and whether the rehabilitated corporation may 'weather the financial storm.' It is also necessary if a thorough-going reorganization is to be effected so that the enterprise can be launched on a more successful career. The confirmed plan, as we have seen, binds every one and consistent

with this the discharge must terminate all manner of claims or interests, else the reorganized business will be hampered at the outset with hold-over obligations which will defeat the very purpose of the proceeding."

To the same effect, see *Mohonk Realty Corp. v. Wise Shoe Stores, Inc.* (C. C. A. 2, 1940), 111 F. (2d) 287; *Ely v. Donoho* (S. D. N. Y. 1942), 45 F. Supp. 27; *Matter of Tom Moore Distillery Co.* (W. D. Ky. 1943), 52 F. Supp. 938; and *Application of Mar-Tex Realization Corp.* (S. D. N. Y. 1944), 54 F. Supp. 593; *American Service Co. v. Henderson* (C. C. A. 4, 1941), 120 F. (2d) 525; *Matter of Munson Steamship Lines* (C. C. A. 2, 1936), 80 F. (2d) 859; *Prudence Realization Corp. v. Ferris* (1945), 323 U. S. 650; *North American Car Corp. v. Peerless Weighing and Vending Machine Corp.* (C. C. A. 2, 1944), 143 F. (2d) 938; *Knapp v. Detroit-Leland Hotel Co.* (C. C. A. 6, 1946), 153 F. (2d) 715.

The cases cited by petitioner in support of Section 2 of his brief on page 17 involved situations where credibility is involved, and the issues were not dependent upon ultimate questions of law. In the present case the reorganization of the Erie and the entry of the Bar Order 386 pursuant to Section 77(f) of the Bankruptcy Act are admitted and the question decided below was as to their legal effect.

There is therefore no sound basis for any argument that the present case presents a situation involving the improper application of Rule 56 relating to summary judgment.

II. The third reason urged by petitioner for the granting of a writ of certiorari suggests a further clarification by this Court of the doctrines announced in the *Consolidated Rock Products* case (312 U. S. 510) and the case of *Comstock v. Group of Investors*, 335 U. S. 211. It is argued that the court below found that the complaint failed to state a claim in that it did not allege fraud, constructive

fraud, spoliation, waste or unfair management on the part of Erie and that such holding involved a misapprehension of the *Comstock* decision.

In the first place it should be noted that both the *Consolidated Rock Products* case and the *Comstock* case were cases on appeal *from a judgment or a decree of the Reorganization Court.* Both cases involved the consideration of the rights of creditors of a subsidiary in connection with the reorganization of the parent *in the reorganization proceedings.* In both cases the parent was asserting *in the reorganization proceedings* substantial claims against its subsidiary, which was being opposed by creditors of the subsidiary.

Neither of these cases are authority for the proposition that a subsidiary may sue a reorganized parent five years after the consummation of a plan of reorganization for the full amount of the debts of the subsidiary.

Whether the claims represented by the petitioner would have been allowed in the Reorganization Proceedings of the Erie had they been presented, need not be considered in the argument on this main appeal. Since, however, the petitioner without any allegations in his complaint as to mismanagement of the subsidiary by the parent nevertheless refers to certain "suspicious circumstances" in connection with the Reorganization Proceedings of the Erie, which are a part of the record of this case, and since the Circuit Court of Appeals makes some reference to these circumstances even in the absence of any affirmative allegations of fraud, constructive fraud, spoliation, etc., there is attached hereto as Exhibit A, certain references to the Erie Reorganization Proceedings relating specifically to the reorganization of the New Jersey and New York Railroad Company during the period from June 30, 1938 to January 1, 1942 in the District Court of the United States for the Northern District of Ohio, Eastern Division. These references show among other things that the Ohio

District Court went to the length of appointing their own expert at the instance of New Jersey's Bondholders Committee to examine into the fairness of the dealings between Erie and New Jersey, who found that such dealings had been fair and that Erie's large claim against New Jersey should be allowed.

III. Reasons four and five urged by the petitioner as a basis for granting the writ suggest the necessity of an opinion by this Court construing Section 77(f) of the Bankruptcy Act.

While apparently conceding that one of the policies of Section 77(f) and the reorganization procedure is that when a plan of reorganization is confirmed and the debtor's property is transferred or retained pursuant thereto, the debtor ordinarily should be regarded as discharged finally from all preexisting debts and liabilities not specifically excepted in the court's order, he urges that the bankruptcy and other courts should be ever vigilant to prevent breach of fiduciary duty, fraud or injustice. The case of *St. Louis & L. S. F. R. R. vs. Spiller,* 274 U. S. 304, is cited for the proposition that a creditor's serious inadvertence in failing to file his claim in a receivership suit within the time specified in an order of the court, and his failure thereby to conform with the terms of the reorganization plan, would not, where he had not been guilty of laches, preclude him from being put, *as nearly as possible consistently with the rights of others,* into the position he would have occupied had he filed his claim in time.

It is significant that complainant in the present case is not asking to be put, as nearly as possible consistently with the rights of others, into the position he would have occupied had he filed his claim in time. He is asking for a money judgment against reorganized Erie for the full amount of the claims represented by him.

It is apparent from an examination of the Plan of Reorganization that had the creditors of New Jersey been

diligent and filed their claims against Erie before the Plan of Reorganization had been approved and had the claims been allowed under the instrumentality theory now propounded by the petitioner, such claims would at most have been allowed as general claims against the Erie for the face amount plus interest, less the value of any security held by them.

The general creditors of Erie under the Plan were given stock of the Erie at $40 a share, which was the book value, but nevertheless greatly in excess of the market value. During the seven years since reorganization, the stock of the Erie has never sold for over $23 a share, and at the time of the hearing below sold for around $8.75 a share. It presently sells for around $11 a share. It follows that if the petitioner prevails in this action, the creditors represented by him would recover a money judgment against reorganized Erie for the face amount of their claims against New Jersey plus interest, which, even if interest were disregarded, would be more than three times as much as they would have received measured by the present value of Erie stock, had they participated in the Plan.

Since December 21, 1941, the common and preferred stock and the First Mortgage and Income Bonds of the Erie have been listed on the New York Stock Exchange and have been bought and sold by the public in large amounts, and many persons have bought these securities for investment in reliance upon the effectiveness of such reorganization and the fact that all preexisting claims and debts have been barred. It is apparent that an action of the kind now being urged by the petitioner would substantially prejudice all such people.

Section 15 of Chapter 3 of the Bankruptcy Act, 11 F. C. A. 33, sets forth the circumstances under which a discharge in ordinary bankruptcy may be revoked as follows:

> "Discharges, when revoked.—The court may, upon the application of parties in interest who have not

been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it if it shall be made to appear that it was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge."

It is significant to note that the time within which such a discharge can be set aside is one year.

It must be admitted that a discharge in ordinary bankruptcy is for the sole benefit of the discharged debtor. In reorganization, of course, there is the added consideration that many parties other than the discharged debtor itself rely upon the relief of the debtor from prior debts. It is therefore highly significant that the rights to revoke a discharge in ordinary bankruptcy are limited to a period of one year after the entry of the same. Section 15 also points up the fact that the Bankruptcy Act is a statute of repose and no creditor should be allowed for any reason to upset a reorganization *five years* after a discharge or a bar order has been entered.

CONCLUSION.

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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EXHIBIT A.

Excerpts from the record of Reorganization Proceedings of The Erie Railroad Company relating to the New Jersey and New York Railroad Company proceedings in the District Court of the United States for the Northern District of Ohio, Eastern Division.

June 30, 1938—Order approving petition of New Jersey for reorganization herein and directing notice to all creditors and stockholders of hearing with respect to appointment of trustees (E 589).

August 2, 1938—Order appointing Ohio Trustees (E 735).

September 7, 1938—Petition of the Trustees of New Jersey for confirmation of the appointment of legal counsel (E 811) in which petition the Trustees reserved the right at a later time to apply to the court for special counsel if any situation should develop in which it would be deemed advisable to appoint special counsel not heretofore connected with either the principal debtor or the New Jersey and New York Railroad Company.

October 8, 1938—Order determining and fixing the time and manner of filing claims against the New Jersey and New York Railroad Company, subsidiary debtor (E 867).

February 11, 1939—Petition of Trustees of New Jersey for the appointment of special counsel (E 1329) reciting that by reason of the conflict of interests involved in the indebtedness and contractual relationships between Erie and New Jersey, in the judgment of the Trustees an exigency arises requiring the appointment of special counsel in no wise connected with the estate of the principal debtor (Erie) or the reorganization of the principal debtor or with any creditor or other party to the proceedings with respect to either debtor for the special purpose of acting and advising the Trustees with respect to said claim of the Trustees of the Erie Railroad Company against the es-

tate of the New Jersey *and any matters involving a conflict of interest between the estates of Erie Railroad Company and the New Jersey,* respectively.

June 7, 1939—Petition of Trustees of New Jersey for the appointment of an expert to examine claim filed by Erie Railroad against New Jersey (E 1609) setting forth that the Trustees were advised by their counsel, specially appointed, that by reason of the ownership by Erie of stock in the New Jersey, and the fact that the same persons were officers of both of said railroads at the time the above mentioned contracts were made and since that time, it was desirable and proper that the terms and conditions of the aforesaid agreements, and the charges made pursuant to said agreements, should be examined by some independent person who, by reason of his experience in transactions of the nature covered by these contracts, and the charges made for the same, is competent to advise petitioners as to the propriety and fairness of the contracts so made and charges based upon the same as aforesaid.

July 1, 1939—Interim Report of Special Master in respect of petition of the Trustees of New Jersey for the appointment of an expert to examine the claim filed by Erie Railroad Company against New Jersey (E 1613). In the opinion of the Special Master (E 1615):

> "However Mr. Richardson, by reason of a study made by him in 1937 on behalf of a Committee of Bondholders of the New Jersey and New York Railroad Company *respecting the operations of that company and its relationship to the Erie Railroad Company,* is already somewhat familiar with the problems involved in respect of the claim of Erie Railroad Company against said Subsidiary Debtor, and for that reason I feel that his selection to perform the task at hand should be favored."
>
> "It should also be mentioned that in reaching that conclusion, consideration is given to the fact that the selection of Mr. Richardson for this work is wholly approved by the Committee of Bondholders of the New

Jersey and New York Railroad Company, whose counsel appeared at said hearing on behalf of the appointment of Mr. Richardson. The appointment of Mr. Richardson, therefore, will meet the approval not only of petitioners as Trustees of the property of the Subsidiary Debtor, but of the Committee of Bondholders and other creditor groups of the New Jersey and New York Railroad Company as well. *It does not presently appear that the Bondholders will in any manner be affected by the claim of Erie Railroad Company.* However, it is conceivable that their interests may be affected by such claim. In any event, the recommendations of the Bondholders Committee and the other creditor groups, as well as the recommendation of petitioners, should be given favorable consideration.

I recommend, therefore, the entry of an order herein providing for the engagement of the services of Lawrence Richardson of Melrose, Massachusetts, to examine the claim filed by Erie Railroad Company against the estate of the New Jersey and New York Railroad Company, including the contracts between those companies and the charges made pursuant thereto." (Emphasis added.)

Notice was duly given to all parties interested in the Erie and New Jersey reorganizations of said hearing before the Special Master, and appointment of said expert was ordered by Order No. 159 (E 1619).

April 15, 1940—Report by Lawrence Richardson in respect of claim of $5,803,983.62 filed by Erie against New Jersey (E 2877) indicating that on the basis of the examination made by him, acceptance of the aforesaid claim was warranted, and Order No. 240, dated July 31, 1940, approved said report, "all parties in interest having been heard or given an opportunity to be heard" (E 2883).

September 10, 1941—Petition of the Trustees of New Jersey *for dismissal of proceedings for reorganization of the New Jersey* and for discharge of *the Trustees of its property and transfer thereof* (E 4213).

The foregoing petition sets out in detail the reasons why it was in the opinion of the Trustees impracticable to

effect a Plan of Reorganization of the subsidiary debtor. By order dated September 18, 1941 (E 4221) the petition of the Trustees was referred to a Special Master, and the Trustees were ordered to give *notice to all Creditors and Stockholders of the New Jersey.* Said petition was filed in accordance with the provisions of Section 77(g) which provides as follows:

> "If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order."

Upon hearing of said petition to dismiss, representatives of holders of substantial amounts of the bonds of New Jersey suggested to the Special Master that they would take appropriate steps for the appointment by a court of competent jurisdiction of a receiver or trustee of the property of the New Jersey, and requested the Ohio court to authorize the transfer of the property of New Jersey to such receiver or trustee when duly appointed and qualified. *There was no opposition to dismissal of the Ohio proceedings.* By order dated October 1, 1941 (E 4265) such procedure was approved.

On November 19, 1941, the Ohio Trustees petitioned for an order providing for the vesting of property of the New Jersey in a Trustee appointed by the New Jersey Federal Court and directing said Trustees to file their account (E 4485). In this petition the Ohio Trustees recited the filing on October 2, 1941, in the New Jersey court by a group of holders of the securities of the New Jersey of a petition for reorganization under Section 77 of the Bankruptcy Act, which said petition was approved; that the

court set a hearing to be held on November 17, 1941, for the appointment of one or more trustees and that at said hearing the New Jersey Court appointed Peter Duryee as trustee of the property of the New Jersey in said proceedings. Said petition then listed all of the claims against the New Jersey theretofore filed in the Ohio proceedings. The petition then prayed that an order be entered vesting the property of the New Jersey in Peter Duryee as Trustee, and directing the Ohio Trustees to file on or before March 1, 1942 their final report and account as Trustees of the property of the New Jersey and New York Railroad Company.

By Order 363 entered November 25, 1941 (E 4493) the foregoing petition of the Ohio Trustees was set for hearing on December 8, 1941, and the Trustees were directed *to serve notice upon all creditors and stockholders* of the New Jersey.

By Order 376 dated December 9, 1941 (E 4715) and upon notice provided in Order 363 the Ohio court ordered that all the property, real, personal and mixed of the New Jersey and New York Railroad Company shall vest at 12:01 A. M. January 1, 1942, in Peter Duryee as Trustee appointed by the United States District Court for the District of New Jersey upon certain conditions.

Subsequently, by Order No. 393 (E. 4895) the Ohio Court, on January 2, 1942, confirmed the vesting of the property of the New Jersey in Peter Duryee as Trustee, and relieved the Ohio Trustees of any further obligations with respect to the operation, maintenance and management of the business of the New Jersey.

Thereafter, on February 26, 1942 (E 5041) the Ohio Trustees of the New Jersey filed their Final Report and Account, and petitioned for an order approving and confirming said Final Report and Account and discharging them as Trustees. By Order No. 405 (E 5059) entered March 2, 1942, the Final Report and Account of the Ohio

Trustees was set for hearing on March 27, 1942, and it was decreed that any party in interest might file objections to said Final Report and Account on or before March 20, 1942. *The Trustees were directed to mail on or before March 5, 1942, a copy of the Final Report and Account and petition in connection therewith and a copy of said order to Peter Duryee, Trustee,* and all parties who had intervened or appeared herein or their attorneys.

Order No. 407 (E 5063) entered March 27, 1942, and on due notice provided in Order 405, indicates that no objections were filed to the Final Report and Account of the Ohio Trustees which was thereupon approved and the Ohio Trustees discharged.